

89-1155,

Supreme Court, U.S.

FILED

JAN 8 1990

JOSEPH F. SPANIOLO, JR.
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No.

**IN THE
SUPREME COURT
OF THE UNITED STATES**

October Term, 1989

JAMES D. THOMAS,

Cross-Petitioner,

vs.

JOHN CARPENTER and COUNTY
OF SANTA BARBARA,

Cross-Respondents.

**CROSS PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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RESPONDENT RECEIVED THE PETITION ON
DECEMBER 8, 1989.

QUESTION PRESENTED

1. Is political loyalty a permissible consideration in determining whether a public employee covered by a civil service system can be subjected to adverse personnel action in retaliation for the employee's campaign activities against his supervisor.

LIST OF PARTIES

The Cross-Petitioner before this Court is James D. Thomas.

The Cross-Respondents before this Court are County of Santa Barbara Sheriff John Carpenter and County of Santa Barbara.



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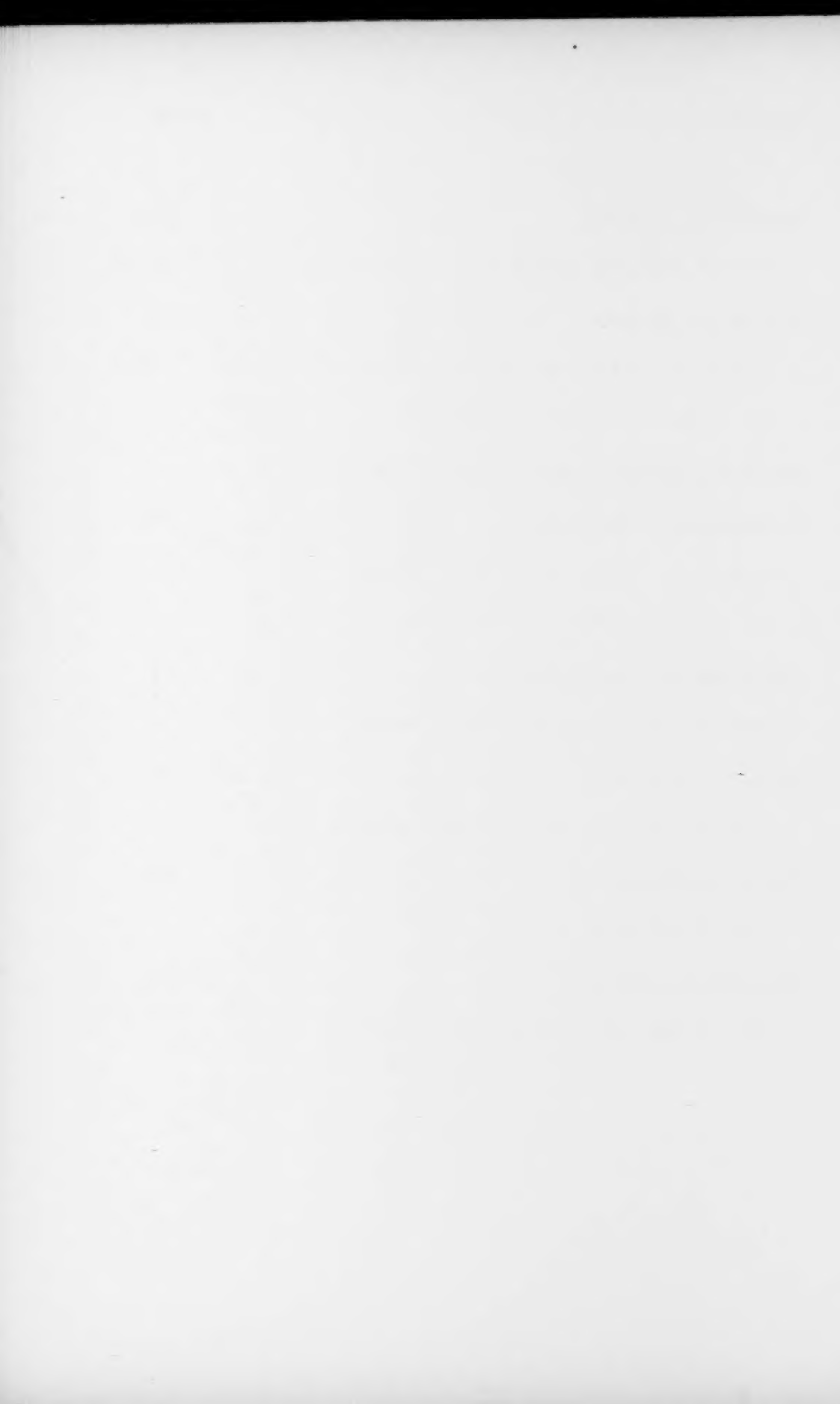


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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

JAMES D. THOMAS, Cross-Petitioner

v.

JOHN CARPENTER, COUNTY OF SANTA BARBARA,
Cross-Respondents

CROSS PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Cross-Petitioner James D. Thomas respectfully prays that a Writ of Certiorari issue to review one portion of the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled action on August 9, 1989. Cross-Petitioner requests the Court to consider granting the cross-petition irrespective of whether it



is disposed to grant the initial petition,
Docket No. 89-933.

OPINIONS BELOW

Cross-Respondents filed a Petition for Certiorari in this matter on December 7, 1989. The matter has been assigned docket number 89-933. The Petition and the attached Appendices accurately set forth the opinions below in this matter. Therefore, Cross-Petitioner adopts the portion of the Petition setting forth the opinions below and appendices a and b of the petition. The citation to the official publication is Thomas v. Carpenter 881 F.2d 828 (9th Cir. 1989).

JURISDICTION

Cross-Petitioner adopts the jurisdictional statement set forth in the Petition filed by Cross-Respondents in this matter.

STATUTES INVOLVED

First Amendment, U.S. Constitution:

This section is reprinted in the appendix hereto, p. 1a, infra.

5 U.S.C. §7324:

This section is reprinted in the appendix hereto, p. 1a, infra.

42 U.S.C. §1983:

This section is reprinted in the appendix hereto, p. 2a, infra.

5 C.F.R. §733.11:

This section is reprinted in the appendix hereto, p. 3a, infra.

Article II, §6(a), (b), California Constitution:

This section is reprinted in the appendix hereto, p. 3a, infra.

California Government Code §3202(a):

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hereto, p. 4a, infra.

California Government Code §3203

This section is reprinted in the appendix
hereto, p. 4a, infra.

California Government Code §3302(a):

This section is reprinted in the appendix
hereto, p. 5a, infra.

California Government Code §24000(a),
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This section is reprinted in the appendix
hereto, p. 5a, infra.

California Government Code §24009(a):

This section is reprinted in the appendix
hereto, p. 5a, infra.

California Labor Code §1101:

This section is reprinted in the appendix
hereto, p. 6a, infra.

California Labor Code §1102:

This section is reprinted in the appendix
hereto, p. 6a, infra.



Santa Barbara County Code §27-21:

This section is reprinted in the appendix hereto, p. 7a, infra.

Santa Barbara County Code §27-25(a)(1)(5):

This section is reprinted in the appendix hereto, p. 10a, infra.

Santa Barabara County Code §27-30:

This section is reprinted in the appendix hereto, p. 11a, infra.

Santa Barbara Department Policy §1.206.1:

This section is reprinted in the appendix hereto, p. 12a, infra.

Santa Barbara Department Policy §1.207:

This section is reprinted in the appendix hereto, p. 13a, infra.

Santa Barbara Department Policy §1.211.1:

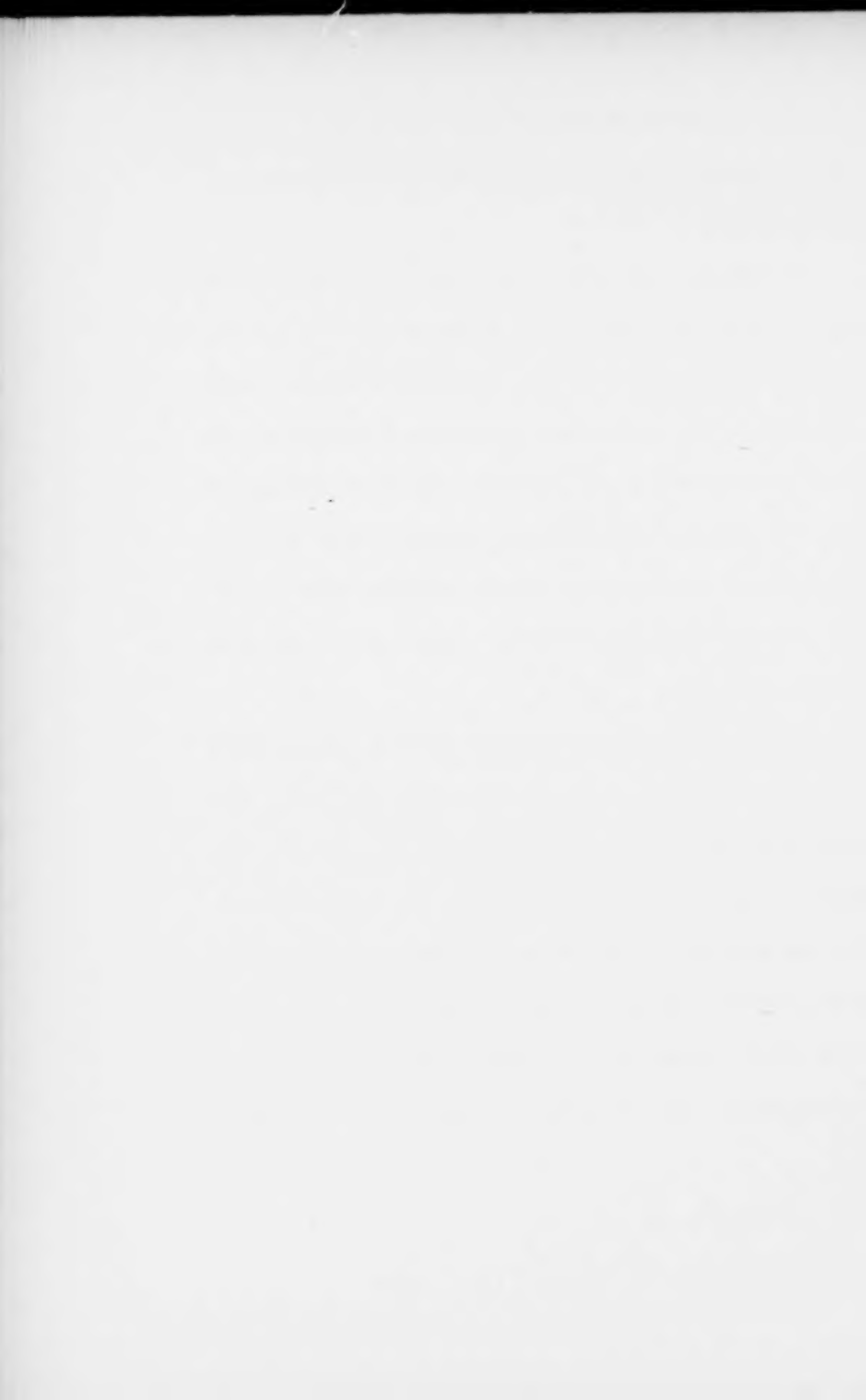
This section is reprinted in the appendix hereto, p. 15a, infra.

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings.

This action arises under the provisions of the Civil Rights Act of 1871, 42 U.S.C. §1983. The district court was requested to exercise pendent jurisdiction over the claims of Thomas that Defendants have violated California Labor Code §§1101 and 1102, Government Code §§3203 and 3302, and Santa Barbara County Code §§27-21 and 27-30.

Thomas filed his original complaint for damages and equitable relief for deprivation of civil rights on March 16, 1988 in the Central District of California. The complaint challenged Thomas' exclusion from department staff meetings. The original complaint was not served on Defendants as a result of a subsequent



adverse personnel action suffered by Thomas: Thomas' exclusion from department manual revision meetings. A first amended complaint for damages and equitable relief for deprivation of civil rights was filed in the Central District of California. The complaint challenged Thomas' exclusion from the department staff meetings and manual revision meetings. Defendants' Rule 12(b)(6) Motion to Dismiss the first amended complaint was granted, and Plaintiff was permitted 20 days within which to file an amended complaint.

On June 22, 1988, Thomas filed a second amended complaint for deprivation of civil rights challengeing his exclusion from the manual revision meetings, department staff meetings, and a new adverse personnel action: Thomas' exclusion as an evaluator for the high risk entry



team exercises. The Defendants filed a Motion to Dismiss Thomas' second amended complaint.

Thomas alleges in his second amended complaint that he suffered the previously stated adverse personnel actions as a result of his unsuccessful campaign against Carpenter for the elected office of Sheriff for the County of Santa Barbara. Thomas seeks injunctive and declaratory relief, and compensatory, general and punitive damages in amounts according to proof.

Thomas alleges that as a result of being excluded from the departmental staff meetings by the Sheriff on the purported grounds of disloyalty and untrustworthiness, Thomas has lost promotional opportunities within the Sheriff's Department and other promotional or lateral opportunities with other law enforcement

agencies in California. (CR 15; Complaint ¶28).¹ Finally, Thomas alleges that he has suffered general damages in the form of loss of professional reputation, and mental and emotional distress as a result of the conduct of Carpenter. (CR 15; Complaint ¶29).

An Order was entered on September 14, 1988 by the district court dismissing Thomas' complaint with prejudice and granting Defendants' Rule 12(b)(6) Motion to Dismiss.

A timely appeal to the United State Court of Appeals for the Ninth Circuit was filed by Thomas. On August 9, 1989, the United States Court of Appeals for the

¹ The above citation is to docket number 15, paragraph 28 of the second amended complaint, found in Excerpts of Record filed with the Ninth Circuit. All subsequent references to the Excerpt will be in the same manner.

Ninth Circuit entered a judgment and an opinion reversing the district court's order of dismissal, and remanding the matter to the district court.

B. Statement of Facts.²

1. The parties.

Cross-Petitioner, James Thomas, (sometimes referred to as "Cross-Petitioner" or "Thomas"), is a citizen of the State of California and a resident of the County of Santa Barbara, California. On or about July 15, 1973, Thomas was hired by the Santa Barbara's Sheriffs Department (hereinafter "Department"). Commencing in July of 1982, THOMAS became an acting

² The statement of facts is discussed in the context that all material allegations in the complaint are to be taken as true and construed in the light most favorable to Thomas, the non-moving party in the Rule 12(b)(6) Motion to Dismiss. Scheuer v. Rhodes 416 U.S. 232, 236, 94 S.Ct. 1686, 40 L.Ed.2d 90 (1974).

lieutenant for Department. In November of 1982, Thomas was promoted to the position of Lieutenant; Thomas has continuously served in the capacity of lieutenant since that date. At all relevant times Thomas has had permanent status in the County's classified civil service system. (CR 15; Complaint ¶2).

Cross-Respondent, County of Santa Barbara, (hereinafter "County") is a subdivision of the State of California. (CR 15; Complaint ¶3).

Cross-Respondent, John Carpenter, (sometimes referred to as "Sheriff" or "Carpenter") is a citizen of the State of California residing in the County of Santa Barbara, California. Carpenter has held the elected county office of Sheriff since June 1970. Carpenter is sued individually and in his official capacity as the Sheriff

of County. (CR 15; Complaint ¶4).

Carpenter has stated publicly to the staff, the department, and the general population as reported in local newspaper articles that Carpenter will in all probability retire at the conclusion of his present term in June of 1990 and endorse Undersheriff Vizzolini for Sheriff. (CR 15; Complaint ¶19).

2. The Thomas Challenge to
Carpenter for the Elected
Office of Sheriff.

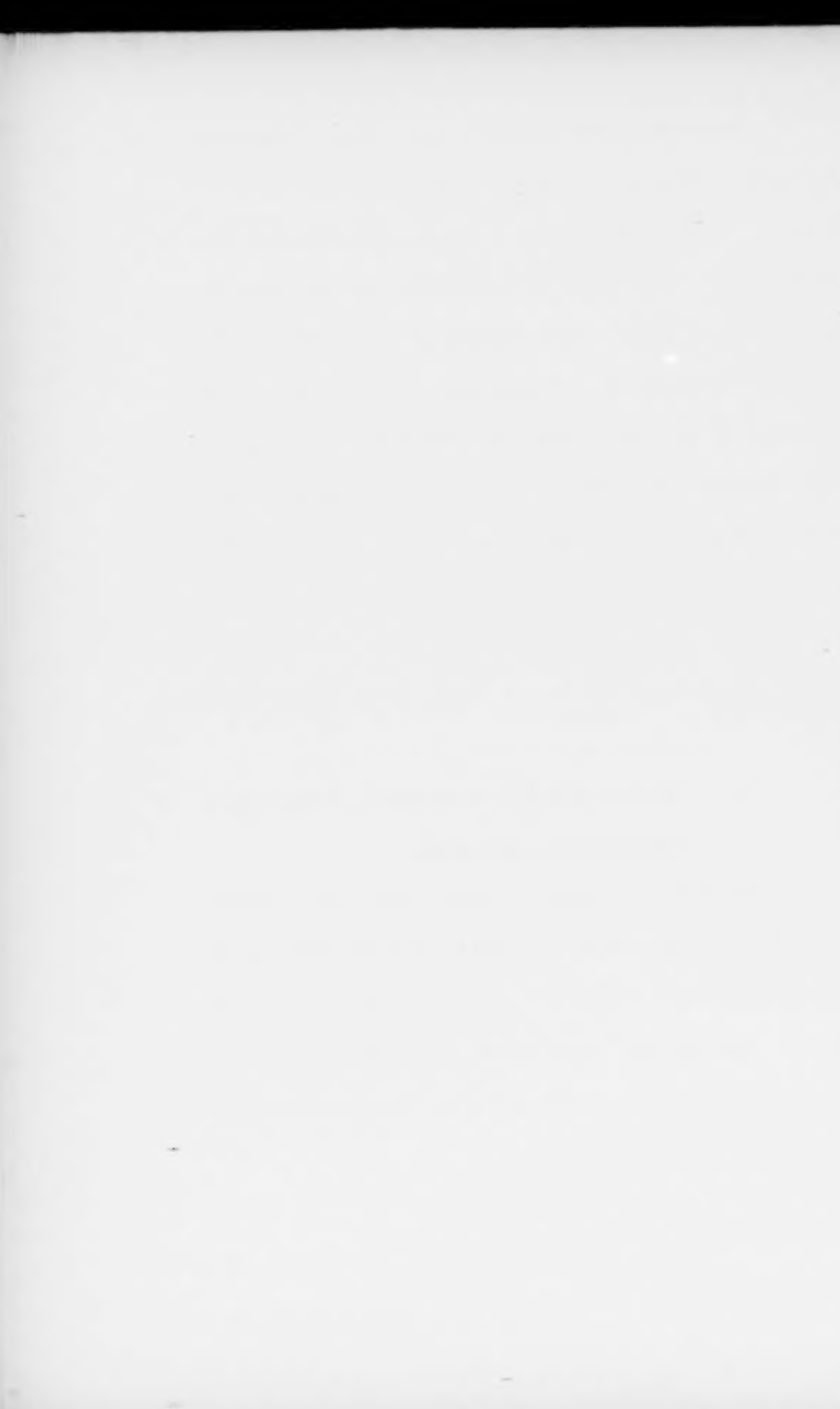
In December of 1985, Thomas decided to challenge Carpenter in the June 1986 Sheriff election. Carpenter was re-elected as Sheriff in June of 1986. Carpenter received approximately 54% of the vote, and Thomas received approximately 46% of the vote. (CR 15; Complaint ¶7).



Thomas attached to the second amended complaint Exhibits 1 through 5 which are examples of the campaign literature that was circulated by Thomas in conjunction with his campaign for Sheriff. The literature compares the various capabilities of the incumbent Carpenter with Thomas on issues concerning management of the Sheriff's department and commitment to the Sheriff's department. The campaign literature is incorporated by reference into the complaint. (CR 15; Complaint ¶13).

3. The Challenged Adverse Personnel Actions.

Thomas alleges that he has been excluded from departmental staff meetings effective September 27, 1987, departmental manual revision meetings effective about March 15, 1988, and as an evaluator in

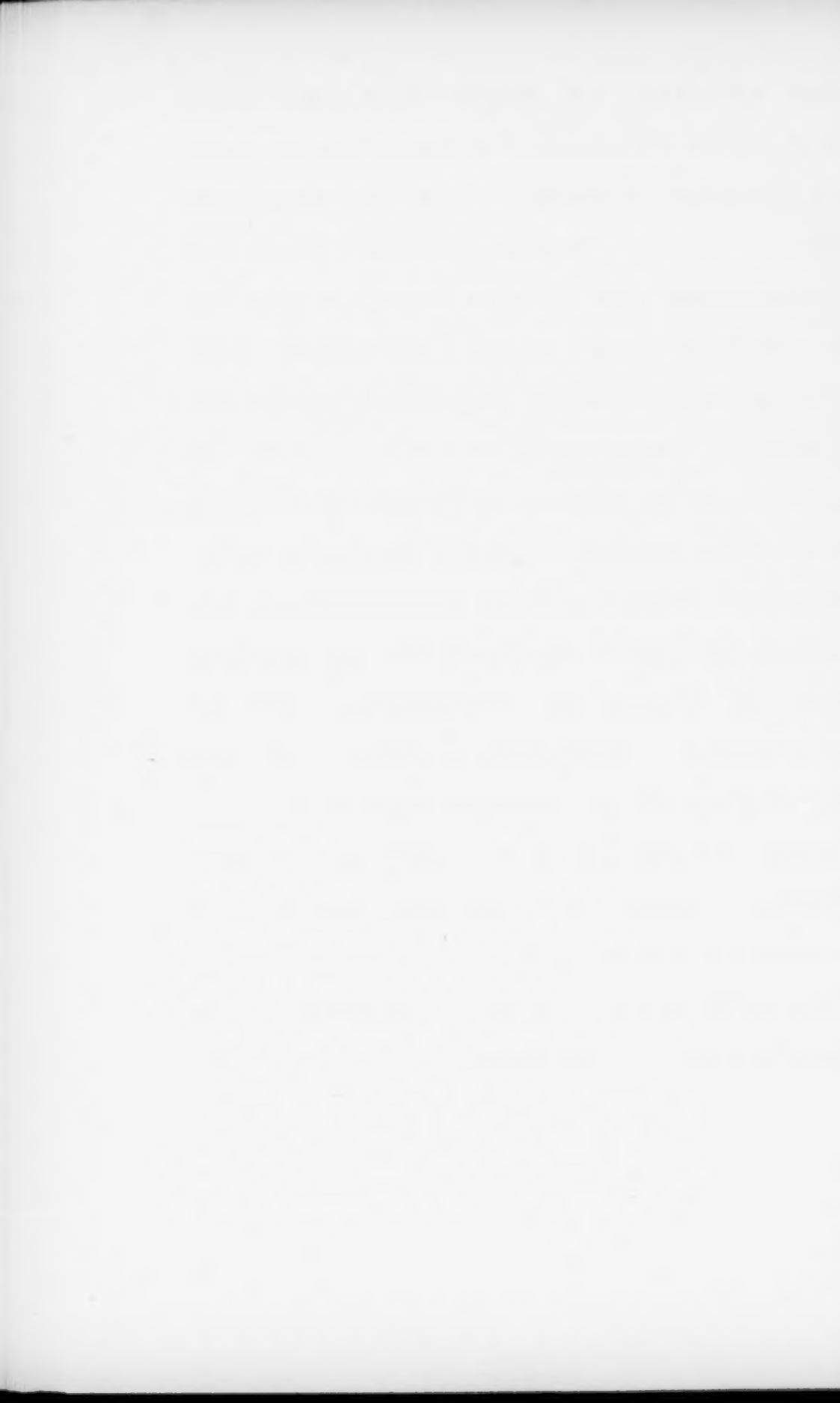


training exercises by the Sheriff Department's high-risk entry team effective April 11, 1988. (CR 15; Complaint ¶¶ 10, 21, 24). Thomas alleges that he is the only lieutenant whom Carpenter has singled out for exclusion from these meetings or training exercises. (CR 15; Complaint ¶ 23). Thomas alleges that Carpenter's decision to exclude Thomas from the departmental staff meetings, the department manual revision meetings, and the training exercises is in retaliation for Thomas having run for public office against Carpenter for the office of Sheriff, and public statements Thomas made during the campaign questioning Carpenter's management of the Sheriff's Department. (CR 15; Complaint ¶¶ 13, 25).

Thomas also alleges in the Complaint the Sheriff's purported justification for



the exclusion of Thomas from the staff meetings: The Sheriff's inability to trust Lt. Thomas' loyalty. (CR 15; Complaint ¶¶12, 15). Thomas denies that his campaigning for the elected office of Sheriff or any public statements made during the campaign concerning Carpenter justify Carpenter's claim of lack of confidence in Thomas, or Thomas is disloyal and untrustworthy. (CR 15; Complaint ¶17). Moreover, Thomas alleges that Carpenter has never initiated disciplinary proceedings against Thomas or disloyalty, lack of confidence, untrustworthiness, or the disclosure of information communicated to Thomas during any staff meetings. (Id.) Thomas alleges that he has attended in excess of one hundred (100) staff meetings including three (3) meetings between the re-election of Carpenter in June of 1986

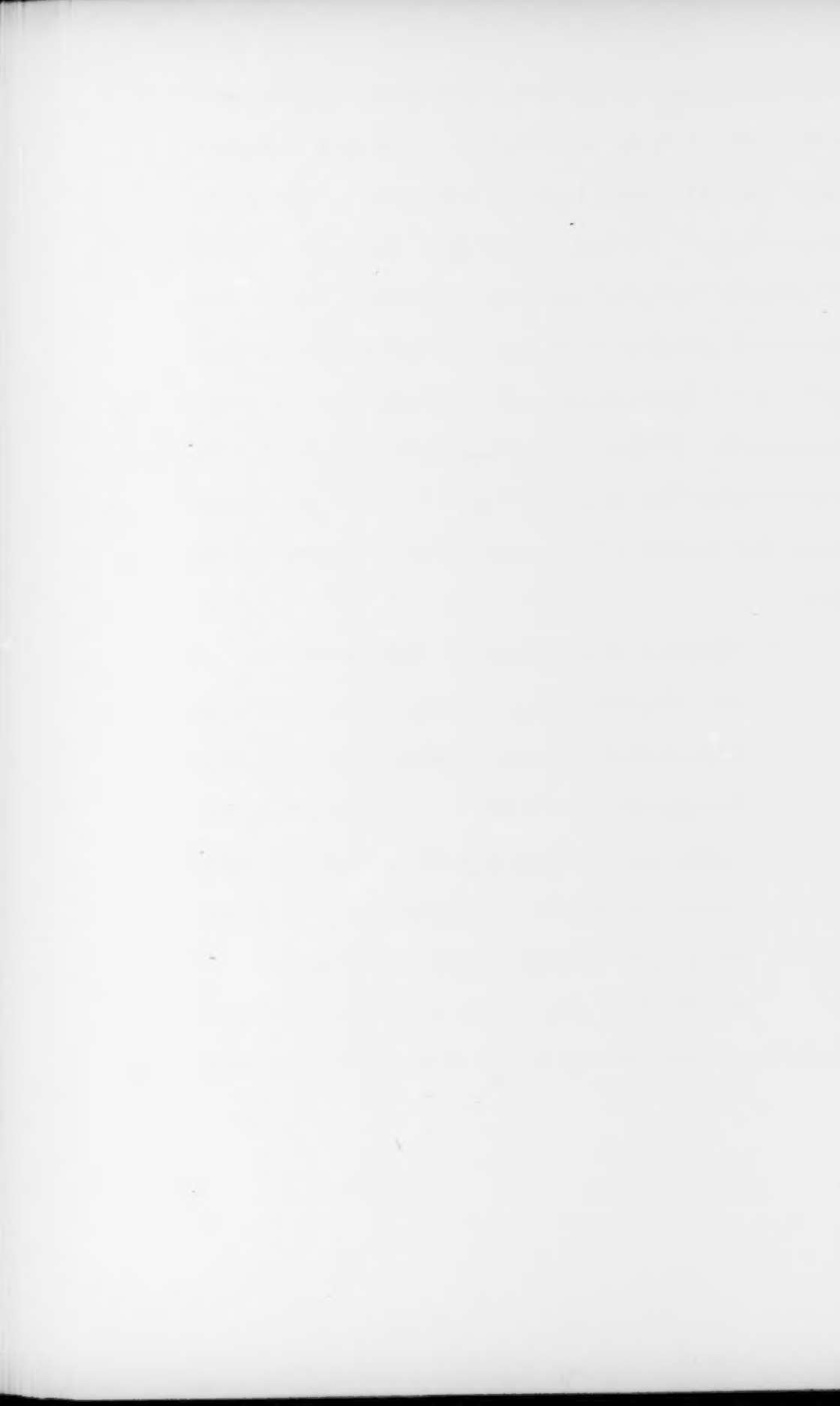


and September 25, 1987, the date Thomas was informed of his exclusion from the department staff meetings. (CR 15; Complaint ¶¶9,10). Thomas alleges that he has attended departmental manual revision meetings before when he was assigned to the Special Investigation Bureau. (CR 15; Complaint ¶20). Thomas alleges that he supervised the department's high-risk entry team for seven (7) years. (CR 15; Complaint ¶24).

REASONS FOR GRANTING THE WRIT

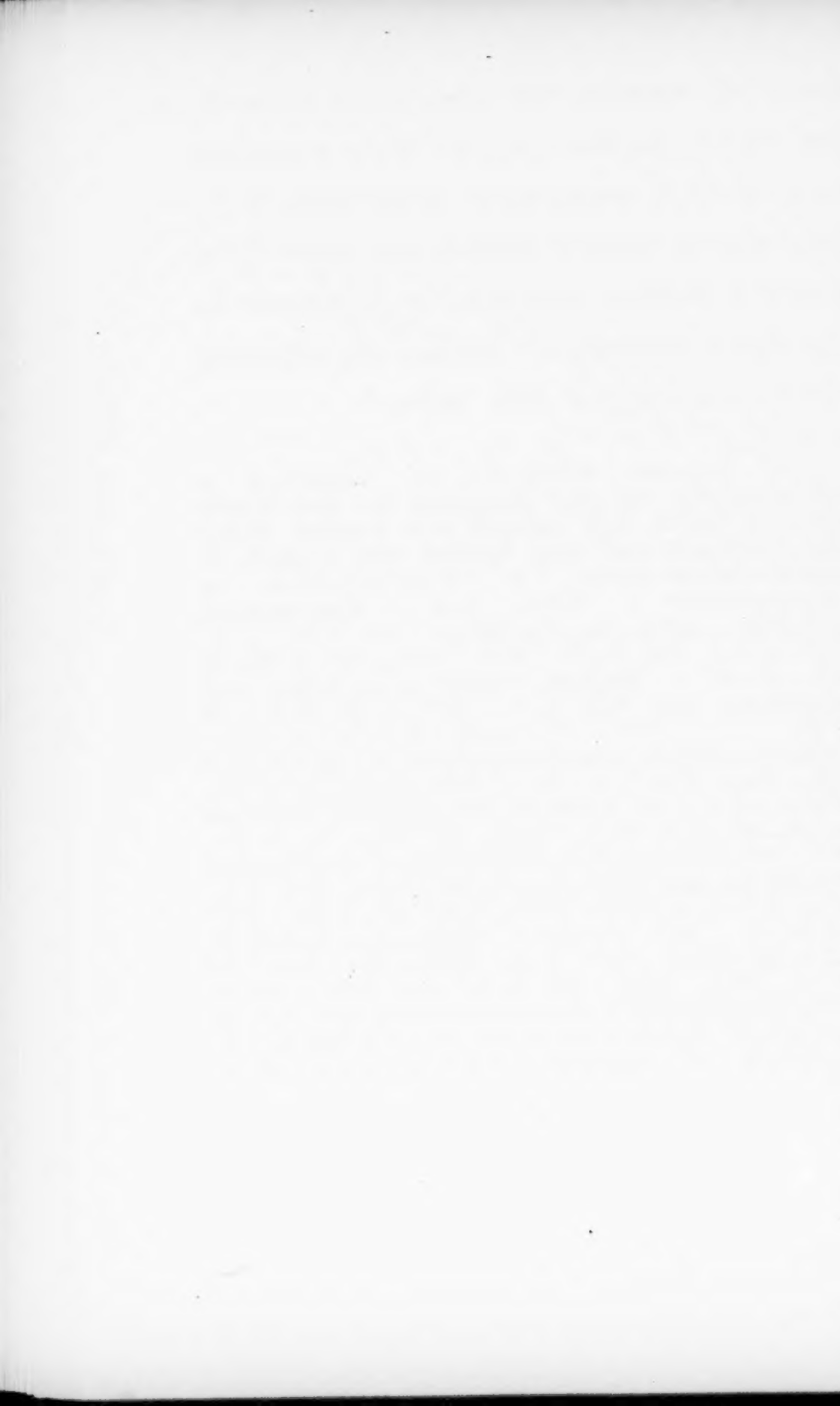
- I. One Aspect of the Ninth Circuit's Decision Conflicts with the Political Affiliation Cases of this Court and the Vast Majority of the Other Circuit Courts of Appeals Which Have Considered the Issue.

Cross-Petitioner challenges only one aspect of the decision of the United States



Court of Appeals for the Ninth Circuit. The Ninth Circuit holds that political loyalty is a permissible consideration in determining whether speech and conduct of a civil service employee is protected by the First Amendment. Thomas v. Carpenter 881 F.2d 831-2 (9th Cir. 1989).³

³ Since Thomas is seeking a modification of the judgment in the Ninth Circuit which may expand his rights under the judgment and may lessen the rights of cross-respondents, a cross-petition is appropriate. See, e.g., Transworld Airlines, Inc. v. Thurston 469 U.S. 111, 119 n.14, 105 S.Ct. 613, 620, 83 L.Ed.2d 523 (1985); United States v. New York Telephone Co. 434 U.S. 159, 166 n.8, 98 S.Ct. 364, 369, 54 L.Ed.2d 376 (1977); Federal Energy Administration v. Algonquin SNG, Inc. 426 U.S. 548, 560 n.11, 96 S.Ct. 2295, 2302, 49 L.Ed.2d 49 (1976); Langnes v. Green 282 U.S. 531, 537-38, 51 S.Ct. 243, 245-6, 75 L.Ed. 520 (1931); and United States v. American Ry. Express Co. 265 U.S. 425, 435, 44 S.Ct. 560, 564, 68 L.Ed. 1087 (1924). But compare Mills v. Electric Auto-Lite Co. 396 U.S. 375, 381 n.4, 90 S.Ct. 616, 620, 24 L.Ed.2d. 593 (1970) suggesting that a cross-petition may not be necessary where a reversal of one aspect of a Court of Appeals' ruling will still



The Ninth Circuit states Carpenter's argument to be that Carpenter can justifiably exclude Thomas from any policymaking role on the Department because Thomas was his political adversary relying on the political affiliation cases of Elrod v. Burns 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d. 547 (1976), and Branti v. Finkel 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980). Id. at 831. The Ninth Circuit first states that Elrod and Branti are not directly on point because they involve political patronage dismissals based upon party loyalty, and the Sheriff's election in Santa Barbara was no partisan. Id. Nevertheless, the Court relies on the Elrod/Branti analysis citing with approval Hall v. Ford 856 F.2d 255, 262 (D.C. Cir.

dictate an affirmance of the Courts' judgment.

1988). Id. The Ninth Circuit concludes that "'the government interest recognized in the affiliation cases is also relevant in the employee speech cases. (Citations omitted).'" Id. Relying on Elrod and Branti, the Ninth Circuit states that "Carpenter may be able to prove at trial, or perhaps even by summary judgment, that Thomas' political loyalty in each of the these positions is needed for the effective implementation of general department policy." Id. at 832. Thus, the Ninth Circuit permits Carpenter to establish "[T]hat Thomas' political loyalty is essential to the effective performance of the tasks removed from his list of responsibilities." Id.

The Ninth Circuit permits Carpenter to attempt to prove at trial or at summary judgment that Thomas' political loyalty is

essential to the effective performance of the tasks removed from Thomas' list of responsibility. Those tasks are Thomas' attendance at the weekly staff meetings, Thomas' role as an evaluator of the department's high risk entry team, and Thomas' participation in policy manual revision meetings.

The Ninth Circuit overlooks a critical distinction clearly stated in Branti and Elrod and Hall v. Ford, supra. Thomas is a civil service employee; Thomas has permanent status in the County's classified civil service system. (CR 15; Complaint ¶2).

A. The Political Affiliation Cases of Elrod and Branti are Inapplicable to Civil Service Employees.

1. The office of sheriff is non-partisan in California.



At the outset, it should be emphasized that the Ninth Circuit found the elected office of Santa Barbara County Sheriff to be non-partisan. Id. at 831. Thus, the political patronage or affiliation cases of Elrod and Branti are distinguishable. The Elrod and Branti cases discuss the circumstances under which one political party can discharge or otherwise discipline non-civil service employees of the other political party when there is a change in the political affiliation of the department head.

In Elrod, the Sheriff of Cook County, a Republican, was replaced by Richard Elrod, a Democrat. Elrod discharged a number of non-civil service employees in the Sheriff's department because they were Republicans pursuant to the past practice in the Sheriff's



department. Similarly, Branti involved a review of the dismissal of assistant public defenders solely because they were Republicans by a newly appointed public defender who was a Democrat. The individuals dismissed by the newly appointed public defender were assistant public defenders who served at the pleasure of the public defender.

In California, the office of Sheriff is non-partisan. The Officers of a County include the Sheriff. (Gov. Code §24000(b).)⁴ In Santa Barbara County, the Sheriff is elected. (Gov. Code §24009(a).)⁵ Pursuant to the provisions of Article II, Section 6 of the California Constitution,

⁴ Government Code §24000(b) is set forth in the Appendix at p. 5a, *infra*.

⁵ Gov. Code §24009(a) is set forth in the Appendix at p. 5a, *infra*.



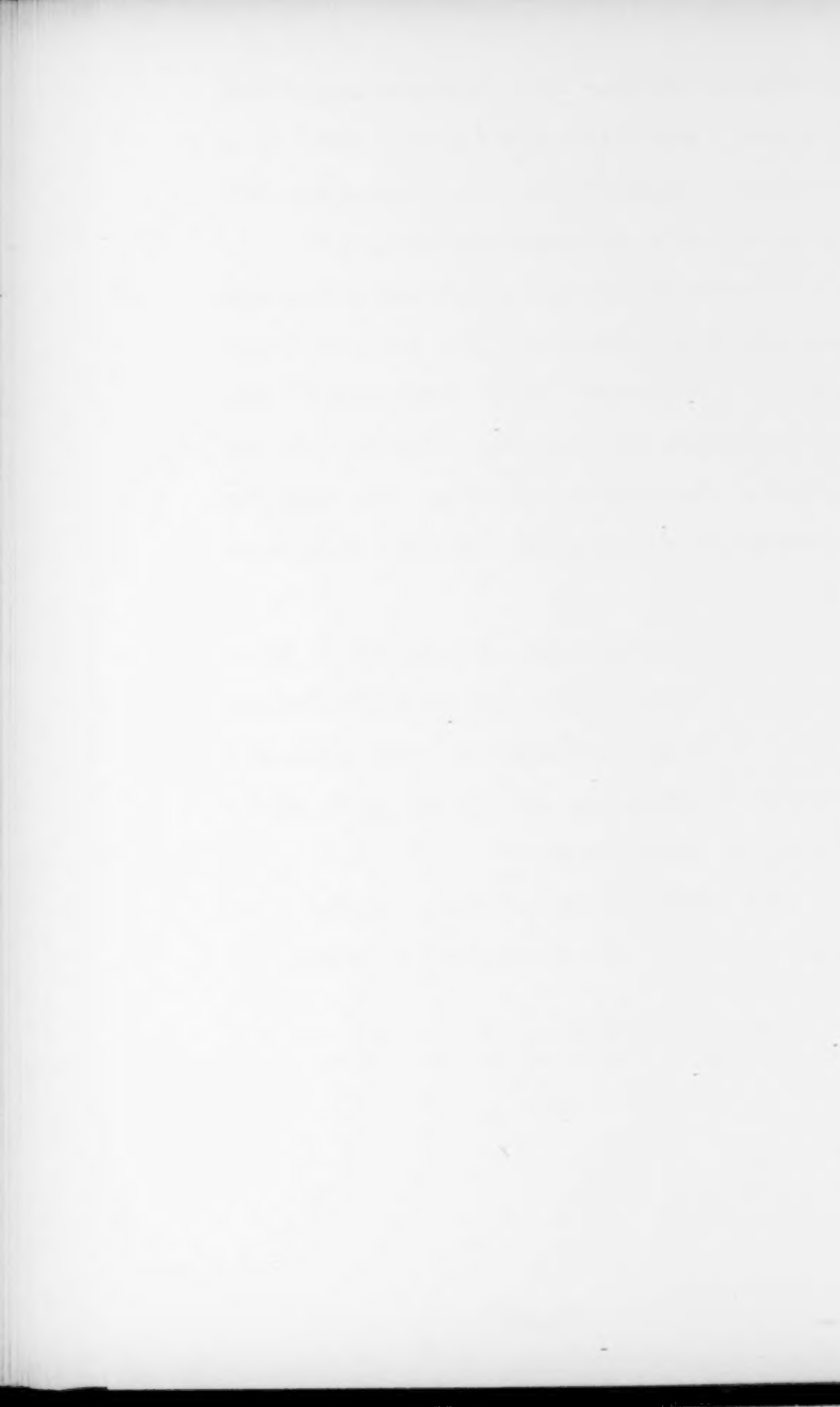
all County offices are non-partisan, and political parties are prohibited from endorsing, supporting, or opposing any candidate for a non-partisan office.⁶

Furthermore, the political patronage cases are distinguishable for an additional reason. Carpenter has expressed his intention not to run for re-election as Sheriff; Carpenter intends to endorse Undersheriff Vizzolini. (CR 15; Complaint ¶19).

2. Thomas is protected from retaliation or discrimination for political affiliations pursuant to local and state enactments.

As previously stated, Elrod and Branti involved the dismissal of non-civil

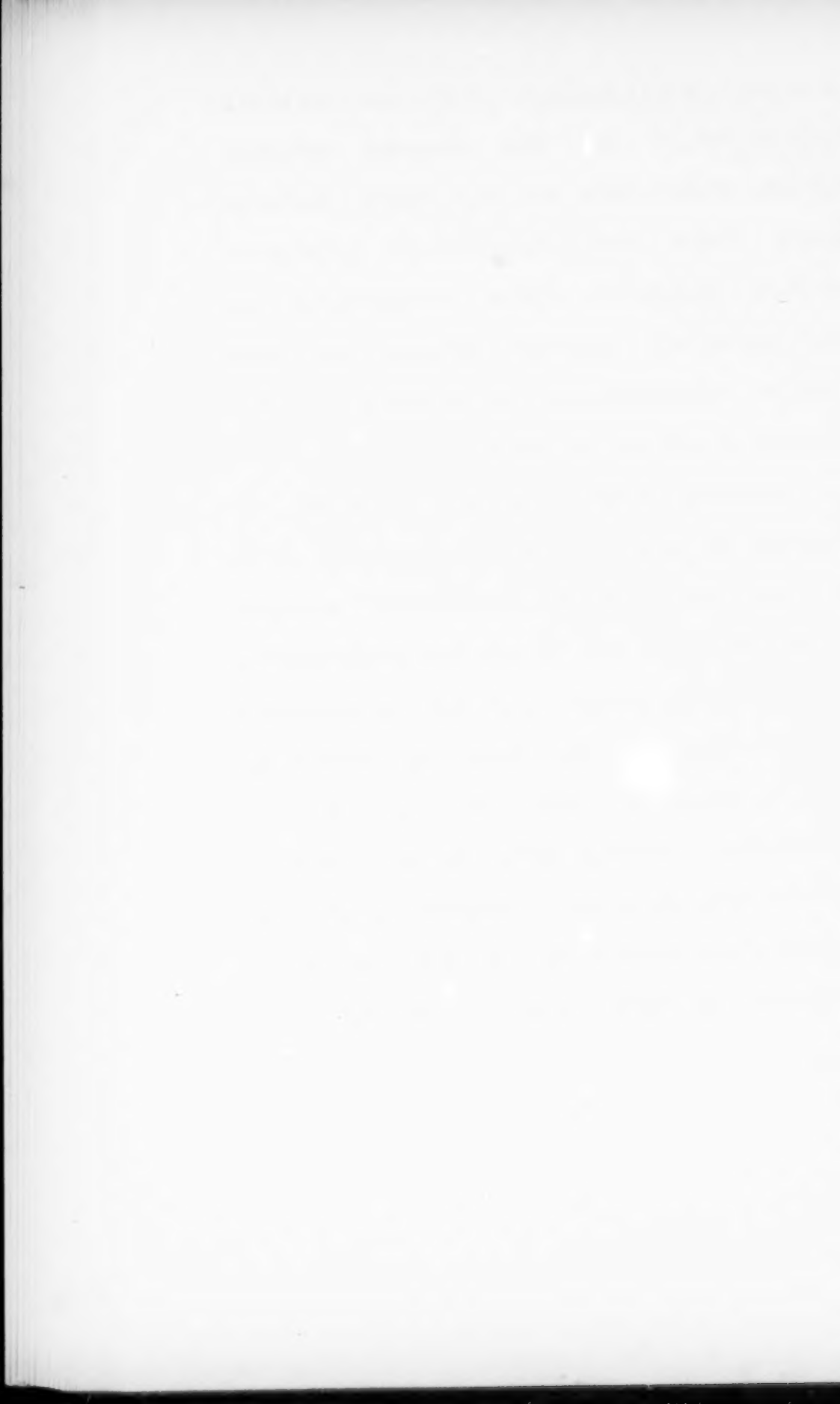
⁶ Calif. Const. Art.II, §6 is set forth in the Appendix at p. 3a, infra.



service employees for political affiliation. In the present matter, relevant provisions of the Santa Barbara County Code and California statutes prohibit Carpenter from retaliating or discriminating against Thomas for his political affiliations in campaigning for the elected office of Sheriff.

County Code §27-21 extends to employees of the County the benefits of a civil service system previously enjoyed only by those in the Sheriff's department.

County Code §27-21 prohibits discrimination in any type of personnel action because of political opinions or affiliations. County Code §27-21 further prohibits the political fortunes of elected officers from affecting the continuance of employment of civil service employees or



their promotions.⁷ Furthermore, County Code §27-30 prohibits favoritism or discrimination against employees due to political affiliations or other non-merit factors.⁸

Moreover, unlike the circumstances in Elrod and Branti, California statutes prohibit discrimination or retaliation against an individual seeking election for a public office. See, California Labor Code §§1101⁹ and 1102¹⁰, and California

⁷ County Code §27-21 is set forth in the Appendix at p. 7a, *infra*.

⁸ County Code §27-30 is set forth in the Appendix at p. 11a, *infra*.

⁹ California Labor Code §1101 is set forth in the Appendix at p. 6a, *infra*.

¹⁰ California Labor Code §1102 is set forth in the Appendix at p. 6a, *infra*.



Government Code §§3302(a),¹¹ 3203,¹² and 3202(a).¹³

Thomas alleges that he has been excluded from departmental staff meetings, departmental manual revision meetings, and as an evaluator in training exercises by the Sheriff Department's high-risk entry team. (CR 15; Complaint ¶¶ 10, 21, 24). Thomas alleges that he is the only lieutenant whom Carpenter has singled out for exclusion from these meetings or training exercises. (CR 15; Complaint ¶ 23). Thomas alleges that Carpenter's decision to exclude Thomas from the

¹¹ California Government Code §3302(a) is set forth in the Appendix at p. 5a, infra.

¹² California Government Code §3203 is set forth in the Appendix at p. 4a, infra.

¹³ California Government Code §3202(a) is set forth in the Appendix at p. 4a, infra.



departmental staff meetings, the department manual revision meetings, and the training exercises is in retaliation for Thomas having run for public office against Carpenter for the office of Sheriff, and public statements Thomas made during the campaign questioning Carpenter's management of the Sheriff's Department. (CR 15; Complaint ¶¶13, 25).

Thomas also alleges in the Complaint the Sheriff's purported justification for the exclusion of Thomas from the staff meetings: The Sheriff's inability to trust Lt. Thomas' loyalty. (Complaint ¶¶12, 15). Thomas denies that his campaigning for the elected office of Sheriff or any public statements made during the campaign concerning Carpenter justify Carpenter's claim of lack of confidence in Thomas, or Thomas is disloyal and untrustworthy. (CR



15; Complaint ¶17).

Moreover, Thomas alleges that Carpenter has never initiated disciplinary proceedings against Thomas or disloyalty, lack of confidence, untrustworthiness, or the disclosure of information communicated to Thomas during any staff meetings. (Id.) Thomas alleges that he has attended in excess of one hundred (100) staff meetings including three (3) meetings between the re-election of Carpenter in June of 1986 and September 25, 1987, the date Thomas was informed of his exclusion from the department staff meetings. (CR 15; Complaint ¶¶9,10). Thomas alleges that he has attended departmental manual revision meetings before when he was assigned to the Special Investigation Bureau. (CR 15; Complaint ¶20). Thomas alleges that he supervised the department's high-risk entry



team for seven (7) years. (CR 15; Complaint ¶24). Thus, Thomas has sufficiently alleged that the Sheriff's retaliatory actions against Thomas resulted from Thomas' campaign activities and statements in Thomas campaign for the elected office of Sheriff.

3. Thomas is not a policy maker or confidential employee within the meaning of Elrod and Branti.

In Elrod, the Court held that a non-civil service employee who is not a policy maker cannot be terminated solely on the grounds of political affiliation. Such terminations, the Supreme Court reasoned, "severely restrict political belief and association." Id. at 372, 96 S.Ct. at 2689. Elrod was superceded by the broader formulation of the Court in the majority



opinion in Branti. In Branti, the Court changed the focus to whether the public employer can demonstrate that party affiliation is an appropriate requirement to effectively perform one's job. The Court stated in Branti as follows:

"In sum, the ultimate inquiry is not whether the label 'policy maker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." Id. at 518, 100 S.Ct. at 1295.

The Thomas complaint alleges that the purpose of the departmental staff



meetings is the dissemination of information to the division commanders by the executive staff. The meetings are normally attended by the Sheriff, the Undersheriff, two Assistant Sheriffs, and the five Captains. The Captains return from the meetings and brief the lieutenants on their content. Lieutenants attend the department staff meetings in the absence of the Captain. Confidential or sensitive matters are normally handled outside of the staff meetings. (CR 15; Complaint ¶8).

Thomas alleges that he was excluded from representing the custody division in the department manual revision meetings. Thomas alleges that the department manual revision meetings are attended by lieutenants for the purpose proposing to the Division Commanders changes in the Department's manual on various policy and



procedures. The Commanders submit the proposals with modifications to the Sheriff. (CR 15; Complaint ¶20). Thomas also alleges he was prohibited from participating as an evaluator in the training exercises of the high risk entry team, a group he supervised for 7 years. (CR 15; Complaint ¶24).

The district court was requested to take judicial notice of the relevant provisions of the Sheriff's Department manual of policy and discipline (hereinafter "policy") in ruling on the Motion to Dismiss. The policies were also summarized and incorporated by reference in their entirety in the complaint. (CR 15: 6-7, 19-24).

Policy §§1.206-211 defines the authority of Lieutenants. A lieutenant has a very limited role in the Sheriff's



department. Lieutenants and sergeants are a "sub-executive". (CR 19: 42, 44; Policy §§1.206.1,¹⁴ 1.207,¹⁵ and 1.211.1)¹⁶. A sub-executive "[C]arr[ies] out department policies and administer[s] and supervise[s] the work of various sub-divisions." (CR 19:44, Policy §1.211.0). Thomas alleges that a Lieutenant, just as any other employee of the Department, can only recommend changes in policy and procedures through the chain of command. (CR 15; Complaint ¶18).

¹⁴ Santa Barbara County Policy §1.206.1 is set forth in the Appendix on p. 12a, *infra*.

¹⁵ Santa Barbara County Policy §1.207 is set forth in the Appendix on p.13a, *infra*.

¹⁶ Santa Barbara County Policy §1.211.1 is set forth in the Appendix on p. 15a, *infra*.



Given the limited and well defined role of a Sheriff's department lieutenant, the Defendants cannot demonstrate "party affiliation" is an appropriate requirement for the effective performance of the public office involved: lieutenant. More importantly, any attempt by Appellees to make such a demonstration of the need for "party affiliation" is in direct conflict with County Code §§27-21 and 27-30.

B. Political loyalty or patronage is the antithesis of a civil service system.

In United States Civil Service Commission v. National Association of Letter Carriers 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973), this Court discusses in extensive detail the history of political patronage and the creation of the federal civil service system with



particular application to the prohibitions in §9a of the Hatch Act. The Hatch Act, at 5 U.S.C. §7324(a)(2), prohibits federal employees from taking "an active part in political management or in political campaigns. This Court states that "until 1871 when a civil service for federal employees was established, federal employees served in a "[s]poil system under which federal employees came and went, depending on party service and changing administrations, rather than meritorious performance..." Id. at 557-58, 93 S.Ct. 2886-87.¹⁷ Similarly, the California

¹⁷ It is noteworthy that the Hatch Act does not prohibit federal employees from taking an active part as a candidate in a non-partisan election. Id. at 576 n.21, 93 S.Ct. 2896 and 5 C.F.R. §73.111(a)(10). In California, the Sheriff's election is non-partisan. Thomas v. Carpenter, supra at 831. See also, California Constitution Article II §6(a), California Government Code §24000(b), and



Supreme Court has consistently held that the purpose of a civil service system is "[T]o abolish the so-called spoils system, and to increase the efficiency of the service by assuring the employees of continuance in office regardless of what party may then be in power." Allen v. McKinley (1941) 18 Cal.2d. 697, 705 (discussing the purpose of the civil service system for the City and County of San Francisco); Steen v. Board of Civil Service Commissioners (1945) 26 Cal.2d 716, 722 (describing the same purpose for the civil service system in the City of Los Angeles); and Skelly v. State Personnel Board (1975) 15 Cal.3d 194, 201 (describing the same purpose for the state civil service system).

California Government Code §24009(a) which are set forth in the Appendix.



In Santa Barbara, County Code §27-21 prohibits discrimination in any type of personnel action because of political opinions or affiliations. County Code §27-21 further prohibits the political fortunes of elected officers from affecting the continuance of employment of civil service employees or their promotions.¹⁸ Furthermore, County Code §27-30 prohibits favoritism or discrimination against employees due to political affiliations or other non-merit factors.¹⁹

Thomas is a civil service employee. Thomas alleges in his complaint that he has permanent status in the county's classified civil service system. (CR 15; Complaint

¹⁸ County Code §27-21 is set forth in the Appendix at p. 7a, *infra*.

¹⁹ County Code §27-30 is set forth in the Appendix at p. 11a, *infra*.



¶2). Thus, Thomas enjoys the protection of County Code §§27-21 and 27-30.

Carpenter's second in command, the Undersheriff, does not enjoy the protections of the civil service system. As the assistant department head, the Undersheriff is specifically excluded from the County's civil service system pursuant to County Code §27-25.²⁰ The Court is requested to take judicial notice of this County Code section pursuant to Rule 201, Federal Rules of Evidence. Thus, political loyalty or affiliation is addressed by the County's civil service system by excluding from its coverage the undersheriff, the assistant department head in the sheriff's department.

²⁰ The relevant provisions of County Code §27-25 are set forth in the Appendix at p. 10a, infra.



C. Extending political loyalty to civil service employees conflicts with Branti, Elrod, and Most Cases from the other Circuits.

The inapplicability of political loyalty in considering whether a civil service employee's speech and conduct is protected by the First Amendment is best shown by the fact that the Branti and Elrod analysis or political loyalty has been considered by most courts only in the context of non-civil service employees.²¹ Political loyalty or patronage is the antithesis of a civil service system. See discussion I B *infra*. The leading cases of

²¹ The Ninth Circuit recognizes that civil service employees are protected from political patronage dismissals. Laquana v. Guam Visitors Bureau 725 F.2d 519, 520 (9th Cir. 1984).



Branti and Elrod both consider political affiliation in the context of non-civil service employees. In Branti, the plaintiffs were two assistant public defenders who served at the pleasure of the public defender. Thus, the plaintiffs did not enjoy civil service protection and could be removed the pleasure of the public defender. Id. at 509, 100 S.Ct. at 1290. In Elrod, the plaintiffs were employees of the sheriff's department when this Court described to be: "[N]on-civil service employees and, therefore, not covered by any statute, ordinance, or regulation protecting them from arbitrary discharge." Id. at 350, 96 S.Ct. at 2678.

Although the following summary is not intended to be exhaustive, the cases reflect the approach in most circuits to determine whether political loyalty or the



Elrod/Branti analysis is a permissible consideration in analysing the conduct or speech of public employees. The cases show that the Elrod/Branti analysis or political loyalty has been applied to civil service employees only one other time by the Seventh Circuit in Shondel v. McDermott 775 F.2d 859 (7th Cir. 1985). The research to date also indicates that there are apparently two cases where the Elrod/Branti analysis has been applied to non-civil service employees who nevertheless had a property interest in their employment relationship and who could only be discharged for cause: Brown v. Trench 787 F.2d 167 (3rd Cir. 1986) and Shakman v. Democratic Organization of Cook County 722 F.2d 1307 (7th Cir. 1983), cert. den. 104 S.Ct. 279 (1983).



Therefore, the Ninth Circuit's opinion in Thomas conflicts with this court's opinions in Elrod and Branti and all but the Seventh Circuit in permitting political loyalty to be a proper consideration in determining whether a civil service employees' speech and conduct are protected by the First Amendment. As previously stated political loyalty is the antithesis of a civil service system.

1. First Circuit.

In Jimenez Fuentes v. Torres Gaztambide 807 F.2d 236 (1st Cir. 1986) (en banc) cert. den. 481 U.S. 1014 (1987) two regional directors of the Puerto Rico Urban Development and Housing Corporation were transferred to their previously held positions when a newly elected governor appointed a new secretary of the department, an executive director, from the



opposite party of the plaintiffs. After an extensive analysis of this Court's holding in Branti and Elrod, and a survey of other cases, the Fuentes Court specifically noted that Plaintiffs, as regional directors, were confidential employees. They could be freely removed and reinstated to their previously held career positions. Id. at 246 n.11. Thus, the Plaintiffs in Fuentes did not have civil service protection in their jobs; they were not "career employees who are selected strictly on merit and can be removed only for cause." Id. at 246 & n.11.

2. Third Circuit.

Laskaris v. Thornburgh 733 F.2d 260 (3rd Cir. 1984) involved the alleged discharge of a personnel analyst and director of municipal services from the Pennsylvania Department of Transportation



allegedly for their political affiliation. However, both employees held positions which were "patronage" jobs. Id. at 265-66.

In Horn v. Kean 796 F.2d 668 (3rd Cir. 1986) (en banc) the Elrod and Branti analysis was applied to hold that political affiliation justified the dismissal of independent contractors who serve as New Jersey Motor Vehicle agents. Thus, New Jersey Motor Vehicle agents, chosen for their positions by a Democratic governor through the political patronage process, could be replaced by the governor's successor, a Republican. Id. at 669.

In Furlong v. Gudknecht 808 F.2d 233 (3rd Cir. 1986), the Court held that party affiliation did not justify the dismissal of the Second Deputy to the Recorder of Deeds, a Democrat, by a newly elected



Republican Recorder of Deeds. The Court focuses on the fact that there was an intervening First Deputy. Id. at 236. It is clear from the statute at issue that the Recorder of Deeds had the discretion to appoint a second deputy who was, therefore, a non-civil service employee. Id.

Bennis v. Gable 823 F.2d 723 (3rd Cir. 1987) involved the political patronage demotion of two detective sergeants to patrolmen in retaliation for their support of the mayor's political opposition in two mayoral elections. The Court applied the Elrod/Branti analysis to their demotion. Although not specifically addressed in the circuit court's opinion, the district court's opinion clearly establishes that the mayor had the authority under the civil service rules to demote the plaintiffs to patrolmen without cause. Bennis v. Gable



604 F.Supp. 244, 249 (E.D. PA 1984). Under the civil service rules at issue, demotions did not have to be made in conformance with the civil service act. In the event of a demotion, the employee was returned to his position as a police officer. Id. at 248-49.

There is one case discussing political affiliation in the context of a non-civil service employee who did have a property interest in her employment. In Brown v. Trench 787 F.2d 167 (3rd Cir. 1986), the Court finds that Plaintiff had a property interest requiring cause for dismissal. Id. at 170-71. However, the employee was not protected by a civil service system. The Court held that the Plaintiff could be dismissed because of her political affiliation without any violation of her first amendment rights. The



plaintiff was a Republican. The plaintiff was the assistant director of public information for the county. The plaintiff was terminated by the new county commissioners who were Democrats. The Court determined that plaintiff's position was one which could not be performed effectively except by someone who shares the political beliefs of the commissioners. The plaintiff's principal duty was to act as spokesman for the commissioners and help promote county projects. Her duties included preparing and distributing press releases, contacting media representatives, and promoting county projects. Id. at 170.

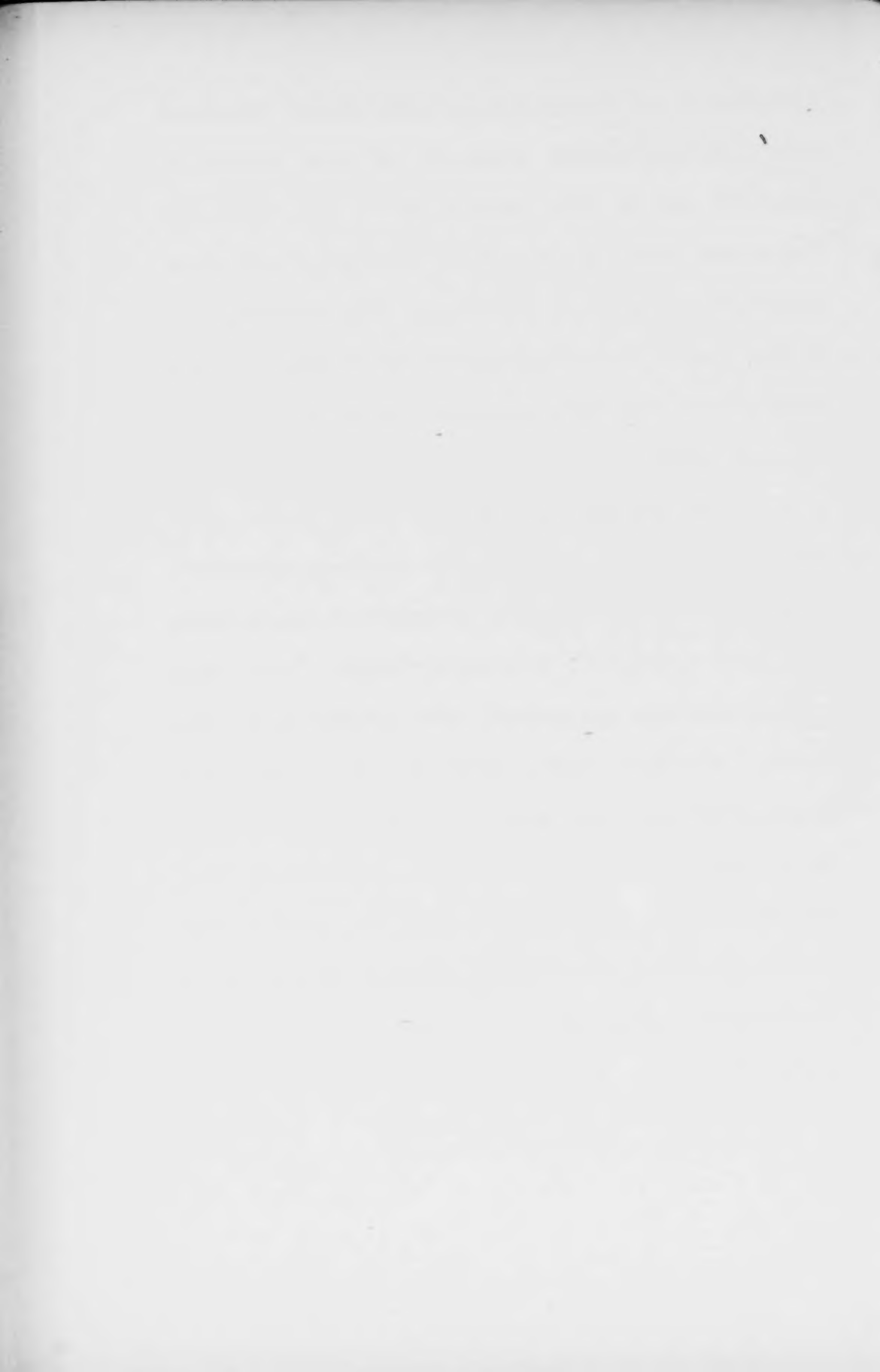
3. Fifth Circuit.

In Barrett v. Thomas 649 F.2d 1193 (5th Cir. 1981) the Elrod/Branti analysis was applied by the Court to determine whether various sheriff Deputies could be



dismissed or demoted by the newly elected sheriff for their support of the defeated sheriff in a 1976 election. The sheriff deputies served at the pleasure of the sheriff; they had no legal entitlement to their jobs, and they could be fired for any reason or no articulable reason at all. Id. at 1199.

In Tanner v. McCall 625 F.2d 1183 (5th Cir. 1980), the newly elected sheriff, a Republican, did not reappoint employees of the sheriff's department who had supported his opponent, the former sheriff. Under Florida law, sheriff deputies are appointed by the sheriff; the sheriff has absolute control over the selection and retention of deputies. Id. at 1186. The Court applied the Elrod/Branti analysis to determine whether the new sheriff was motivated by an intent to discriminate



against plaintiffs because of their support for the prior sheriff.

4. Sixth Circuit.

Balogh v. Sharron 855 F.2d 356 (6th Cir. 1988) involved the political patronage discharge of a court officer/bailiff by a newly elected Michigan trial judge. The Court applied the Elrod/Branti analysis to determine whether the bailiff could be discharged because he supported the judge's opponent in a recently concluded judicial election. Although the circuit court does not discuss the employee's civil service status, the district court specifically found that the court officer was an "at-will" employee who served at the pleasure of the judge. Balogh v. Sharron 666 F.Supp. 987, 988 (E.D. Mich. 1987).

5. Seventh Circuit.

There is at least one Seventh



Circuit case in which the Elrod/Branti analysis was applied to an employee who could only be removed for cause. In Shakman v. Democratic Organization of Cook County 722 F.2d 1307 (7th Cir. 1983), cert. den. 104 S.Ct. 279 (1983), the Elrod/Branti analysis was applied to determine the constitutionality of the removal of the Superintendent of Employment for the Chicago Park District. Although the employee could only be removed for palpable incompetence or malfeasance in office (Id. at 1308), the employee was not covered by a civil service system. The Court rejected the employee's argument that party affiliation is not an appropriate requirement for effective performance of the position because he could only be removed for incompetence or malfeasance. Id. at 1310. Rather, the Court determined



that his statutory right to be terminated for cause is only one fact in the calculus opposing the application of the "policy maker" exemption discussed in Elrod. Id. at 1310.

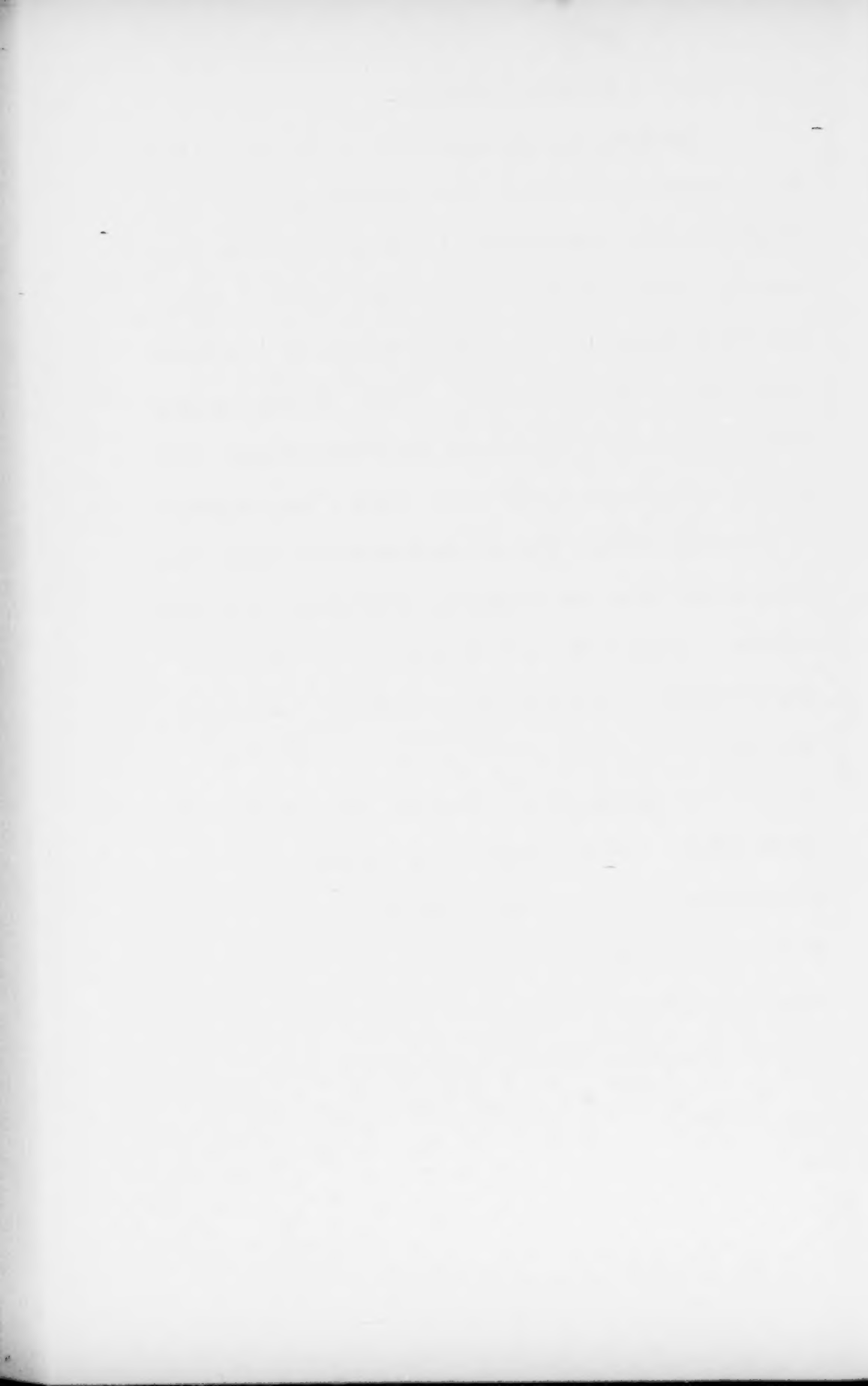
There appears to be one case where political loyalty or the Elrod/Branti analysis was at issue in the discharge of a civil service employee. In Shondel v. McDermott 775 F.2d 859 (7th Cir. 1985) the Elrod/Branti analysis was applied to determine whether the plaintiff was discharged from a civil service non-patronage job as a result of her political activities on behalf of her stepfather, the unsuccessful opponent of the mayor. The circuit court affirmed the district court's finding that Shondel was not fired in political retaliation for her political activities.



6. Eighth Circuit.

Horton v. Taylor 767 F.2d 471 (8th Cir. 1985) involves the discharge of five road grader operators in a small Arkansas county who were terminated by a newly elected Democratic administration because they were Republicans. The Elrod/Branti analysis was applied to determine the constitutionality of the employees' discharge after first determining that the employees had no tenure, contract, or any other implied promise of continued employment creating a property interest. Id. at 474.

In Barnes v. Bosley 745 F.2d 501 (8th Cir. 1984) employees hired under a patronage system who were deputy city clerks at the time of their dismissal or reassignment could not be removed for their political affiliation because their job

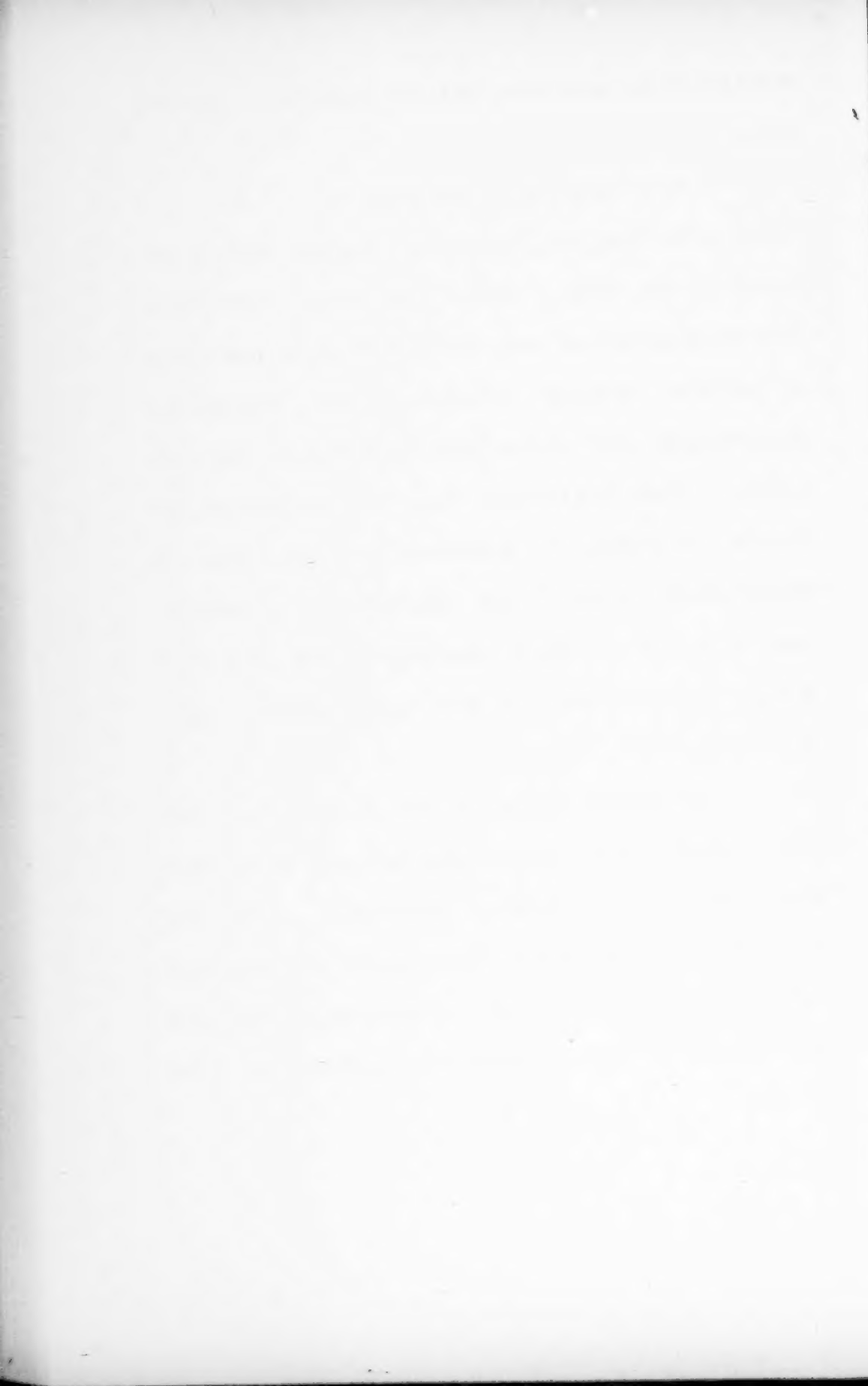


duties were ministerial in nature. Id. at 508.

7. Eleventh Circuit.

In Ray v. City of Leeds 837 F.2d 1542 (11th Cir. 1988) the Court affirmed the dismissal of Ray on the ground she held a policy making position and could be discharged for political reasons. Id. at 1544. The Plaintiff was the director of Leeds Community Service. She was a department head. Id. at 1544. However, Ray was an at-will employee and had not property interest in her employment. Id. at 1543, 1545.

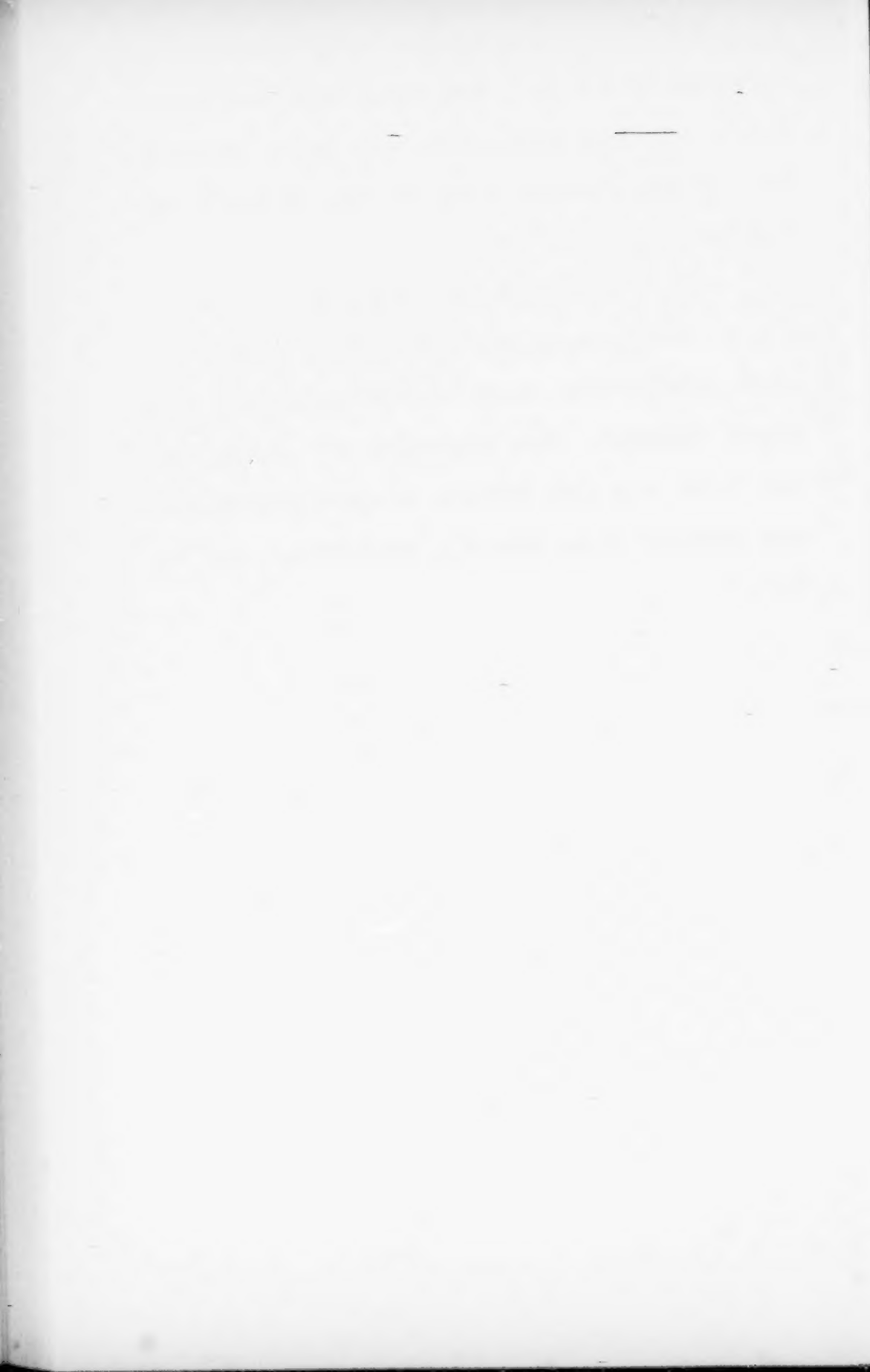
In Terry v. Cook 866 F.2d 373 (11th Cir. 1989) the Elrod/Branti analysis was applied to a newly elected sheriff's failure to reappoint the chief deputy and deputy sheriffs and non-deputy sheriff employees who had been appointed by the



defeated sheriff. The case involved non-civil service employees who must reapply for re-employment when a new sheriff is elected. Id. at 378.

8. District of Columbia.

In Hall v. Ford 856 F.2d 255 (D.C. Cir. 1988), the case relied upon by the Ninth Circuit, the employee at issue did not have any job tenure or protection and was therefore an at-will employee. Id. at 265.



CONCLUSION

For the foregoing reasons, it is respectfully requested that the Petition for Writ of Certiorari be granted.

DATED: January 5, 1990
Newport Beach, CA

Respectfully submitted,

SILVER, GOLDWASSER & SHAEFFER
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GEORGE W. SHAEFFER, JR.

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Attorneys for
Cross-Petitioner

A0185.PET



APPENDIX A



FEDERAL

First Amendment, U.S. Constitution:

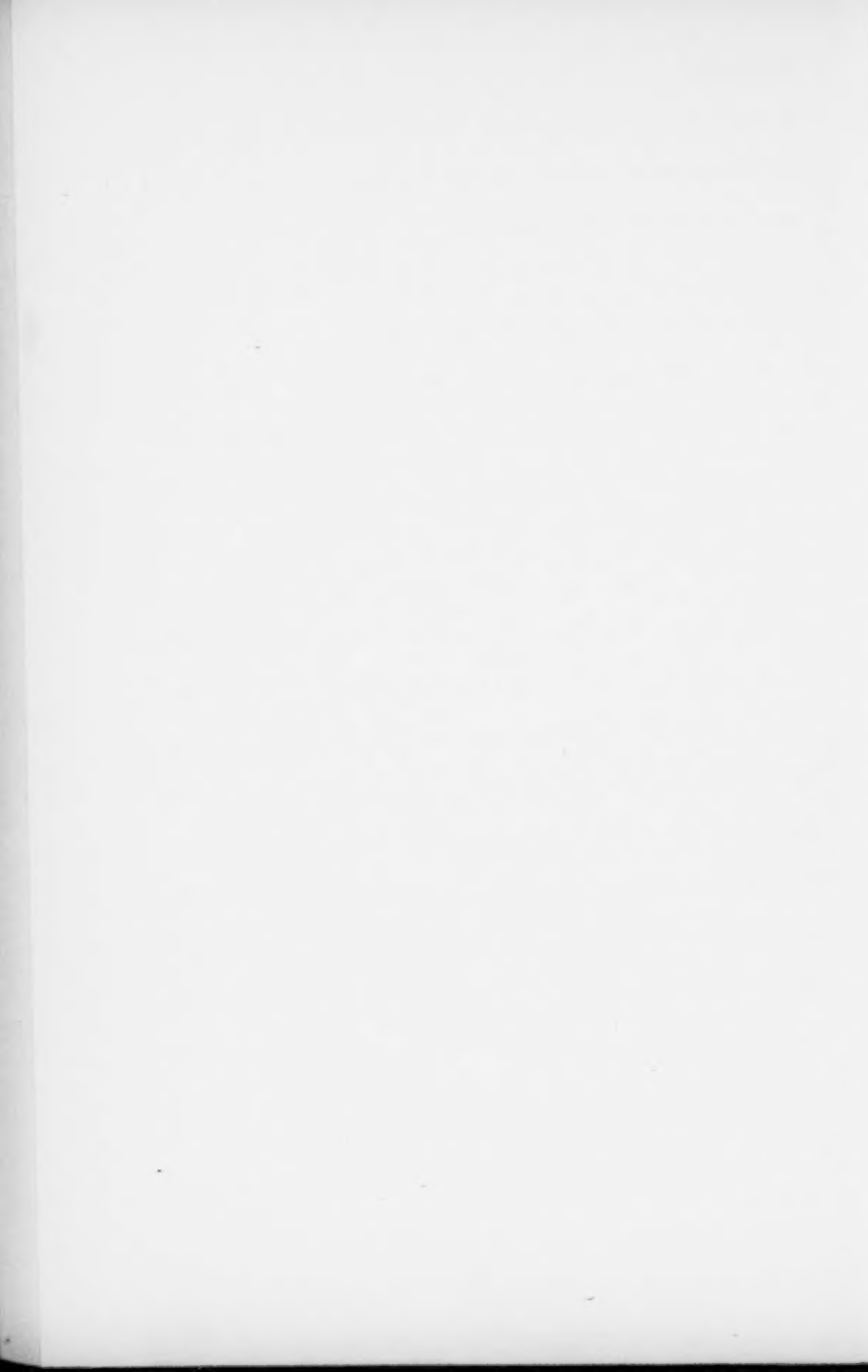
"Congress shall make no law... abridging the freedom of speech..."

Title 5 U.S.C. §7324 provides:

"(a) An employee in an Executive agency or an individual employed by the government of the District of Columbia may not -

". . .

"(2) take an active part in political management or in political campaigns. "For the purpose of this subsection, the phrase 'an active part in political management or in political campaigns' means those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service



Commission under the rules prescribed by the President."

United States Code, Title 42, Section 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

5 CFR pt. 733, provide:

"PERMISSIBLE ACTIVITIES

"§733.111 Permissible activities.

"(a) All employees are free to engage in political activity to the widest extent consistent with the restrictions imposed by law and this subpart. Each employee retains the right to -

" . . .

"(10) Take an active part, as a candidate or in support of a candidate, in a nonpartisan election."

CALIFORNIA

California Constitution Article II
§6(a), (b):

"(a) All judicial, school, county, and city offices shall be nonpartisan.

(b) No political party or party central



committee may endorse, support, or oppose a candidate for nonpartisan office."

California Government Code §3202(a):

"(a) Local Agency means a county, city, city and county, political subdivision, district other than a school district, or municipal corporation. Officers and employees of a given local agency include officers and employees of any other local agency whose principal duties consist of providing services to the given local agency. "

California Government Code §3203:

"An undersheriff in a general law county retains his position as undersheriff when he discharges the duties of the vacant office of sheriff pursuant to §24105 or when he becomes a candidate for the office

of sheriff for the next term even though he is defeated at the polls."

California Government Code §3302(a) provides:

"Except as otherwise provided by law, or whenever on duty or in uniform, no public safety officer shall be prohibited from engaging, or be coerced or required to engage, in political activity."

California Government Code §24000(a), (b):

"The offices of a county are:

(a) A district attorney.

(b) A sheriff."

California Government Code §24009(a):

"(a) Except as provided in subdivision (b), the county offices to be elected by the people are the treasurer, county clerk,

auditor, sheriff, tax collector, district attorney, recorder, assessor, public administrator, and coroner."

California Labor Code §1101:

"No employer shall make, adopt or enforce any rule, regulation, or policy: [¶] (a) Forbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office. [¶] (b) Controlling or directing, or tending to control or direct the political activities or affiliations of employees."

California Labor Code §1102 provides:

"No employer shall coerce or influence or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or



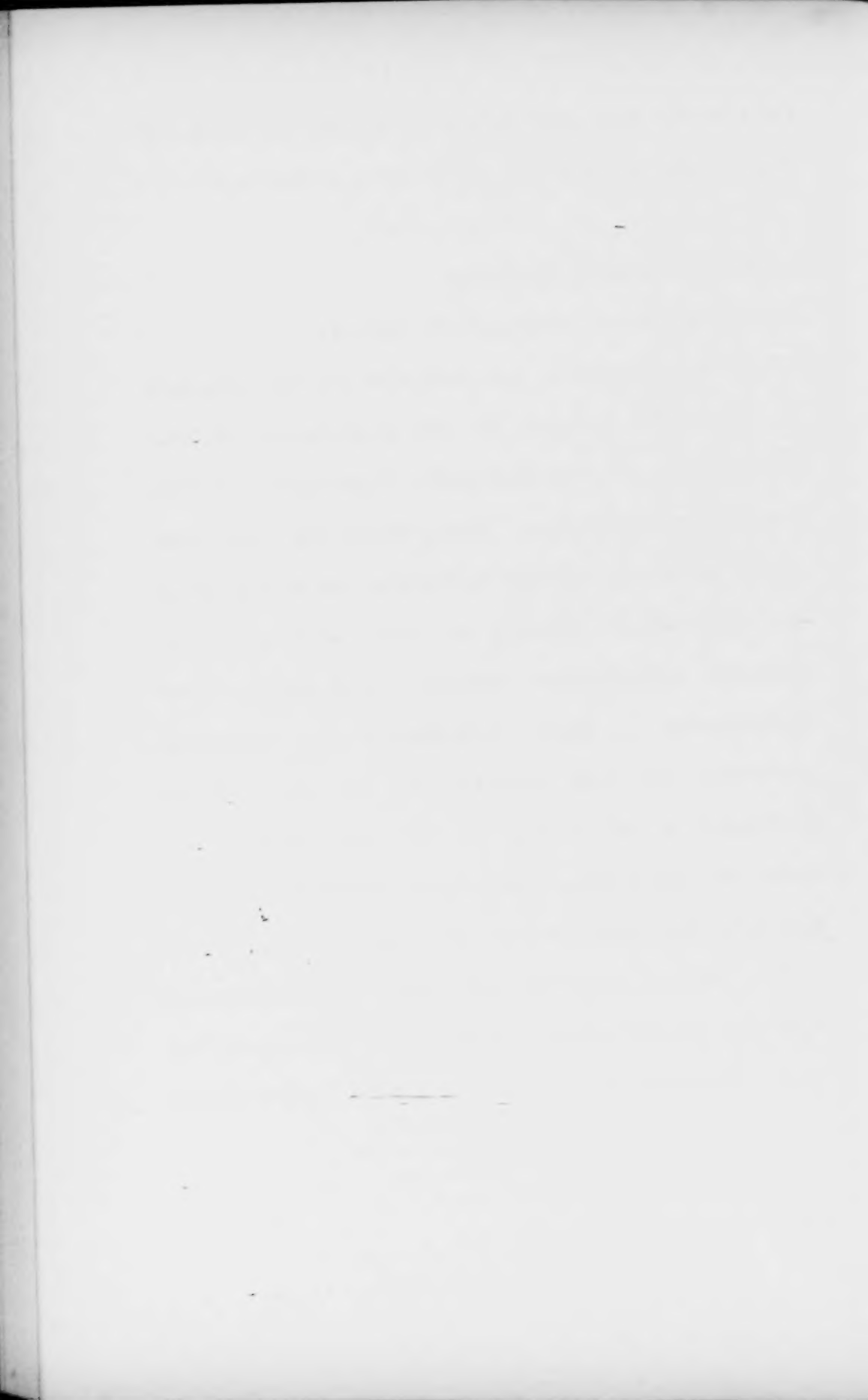
following any particular course or line of political action or political activity."

COUNTY OF SANTA BARBARA

Santa Barbara County Code §27-21:

"This amendment to article II is adopted in order to extend to the employees of the county and of the judicial districts in the county, generally, the benefits of the civil service system formerly covering only the sheriff's office of the county, with certain amendments thereto and exclusions therefrom. This amendment is adopted pursuant to the provisions of part 2 of division 4 of title 30 of the Government Code of the state (sections 31100 to 31115) and any amendments and successors thereto.

The basic purpose of the civil service system established hereby is to establish and maintain a fair and equitable



employment relationship between the county and its employees which will promote and increase efficiency and economy in county service.

The primary objective is to fill each position with the best qualified person available and to ensure that fair, equitable and competent promotion procedures are an essential part thereof. The political fortunes of elective officers shall not affect the continuance in employment of county civil service employees nor their promotions. Promotions to a higher position shall be made promptly as vacancies occur, and as employees qualify for such promotions by merit, fitness and capable performance.

Tenure of employment is subject to good behavior, efficiency necessity for performance of particular public work and



appropriations of public funds. Arbitrary or capricious dismissals or other disciplinary actions affecting county civil service employees are prohibited. All suspensions, demotions and dismissals shall be subject to such reviews and hearings as shall guarantee due process to all employees concerned.

Positions shall be filed (except as otherwise provided) on the basis of merit and fitness ascertained through practical, competitive examinations. Positions involving comparable duties and responsibilities shall be similarly classified and compensated. Discrimination against any person in recruitment, examination, appointment, training, promotion, retention, or any other personnel action, because of political or religious opinions or affiliations or



because of race, national origin, or other non-merit factors will be prohibited. The regulations will include appropriate provisions for appeals in cases of alleged discrimination.

Elected officers, county employees occupying supervisory positions, and the civil service commission shall perform their duties and carry out their responsibilities according to the spirit and the letter of this article, so as to give the general public of the county good, honest, efficient and economical government." (Ord.No. 11-3-70, §2).

Santa Barbara County Code §27-25(a)(1)(5):

"(a) All employees of the county shall be included in the civil service system hereby adopted and also called the classified service except that the following are

exempt from the provisions of this article.

(1) All elected county officers.

. . .

(5) Any appointive department head and all assistant department heads; provided, however, that all department heads and assistant department heads shall remain subject to the provisions relative to recruiting and selection. As assistant department head is hereby defined as the person or persons who are in charge of any county department in the absence of the department head.

Santa Barbara County Code §27-30:

"No person in the classified service or seeking admission thereto shall be appointed, promoted, reduced or removed, or in any way favored or discriminated against because of his race, creed, color,



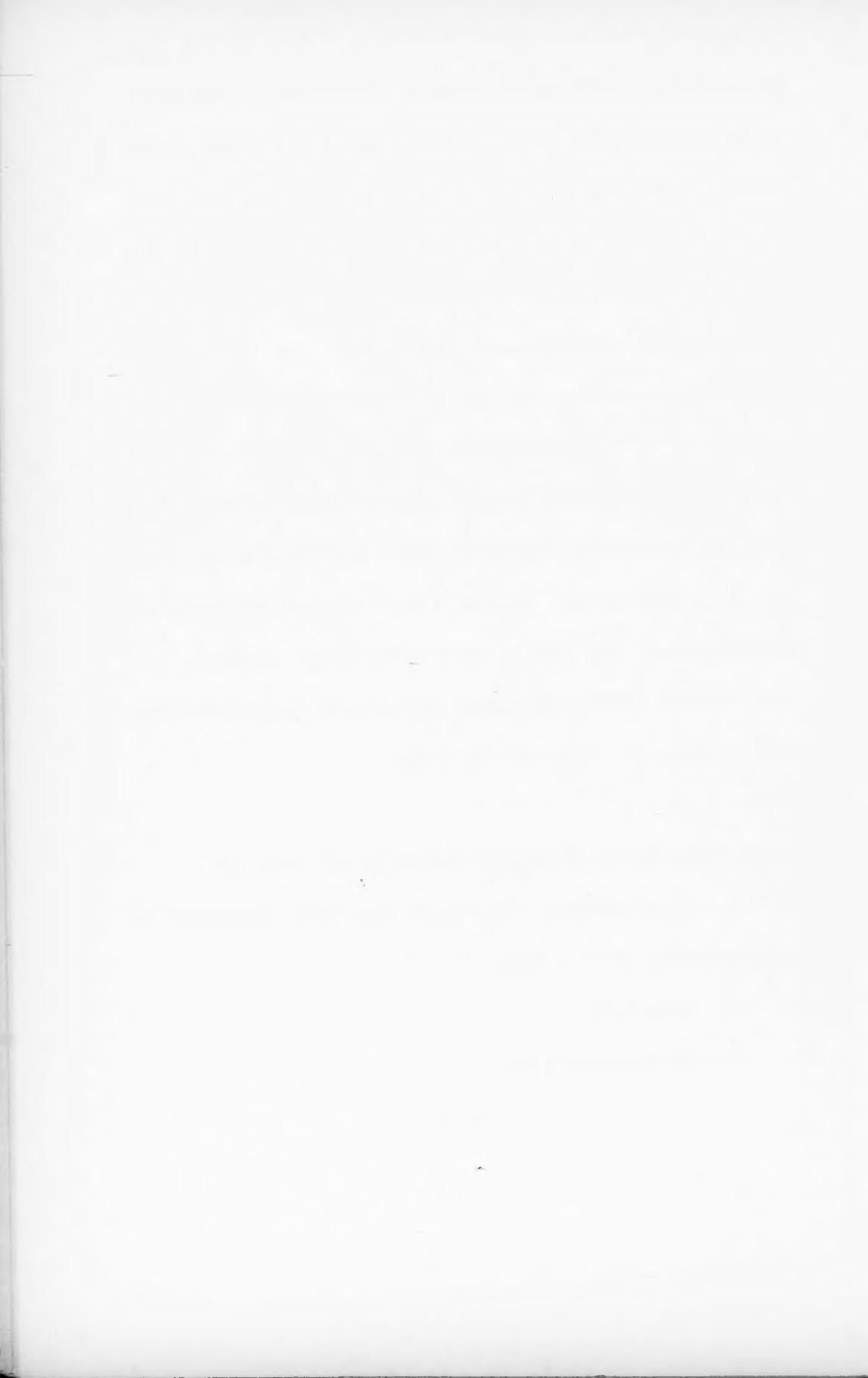
political affiliations, national origin, irrelevant physical handicaps or other non-merit factors. No person shall be subject to favor or discrimination against him or her because of his or her sex, but certain employment positions may be made eligible only for males or only for females where peculiar requirements of such positions reasonably limit such employees to either the male or the female sex, as the case may be. Persons alleging discrimination prohibited by this section may appeal to the civil service commission as provided by the rules." (11-3-70, §2).

Santa Barbara Sheriff Policy §1.206.1:

".1 The order or rank in the Sheriff's Department shall be:

Sheriff

Undersheriff



Inspector
Captain
Lieutenant
Sergeant

Santa Barbara Sheriff Policy §1.207:

".1 The Sheriff is the chief administrator and executive officer of the Department. Upon him rests final responsibility for determining office policies, together with full responsibility for the complete discharge of all duties imposed on him by law.

.2 As chief executive officer, the Sheriff must officially sanction and approve any changes in office organization before the changes can be put into effect. The detailed methods of directing and controlling specific functions of the Department or of its divisions and



subdivisions may be developed by subordinate executive officers, but the original direction and final approval and adoption of the guiding principles rests with the Sheriff.

.3 In his capacity as chief executive and administrative head of the Department, the Sheriff maintains administrative control and governs office activity through major executives who also act in an advisory capacity in matters of general office policies and procedures. These major executives are;

- a. Undersheriff
- b. All Division Commanders

.4 The above major executives are ranked as shown for purposes of administrative control. In the absence of the Sheriff, they will assume control of



the entire Sheriff's Department in the order given, any one to assume command when all those named before him are absent, and as directed by the Sheriff."

Santa Barbara Sheriff Policy §1.211.1:

"1 Sub-Executives, having disciplinary and supervisory powers, carry out department policies and administer and supervise the work of various subdivisions. These officers are subordinate to those named previously, and are ranked as shown in Paragraph 1.206.1 of this procedural order.

No. 89-1155

Supreme Court, U.S.

FILED

FEB 21 1990

JOSEPH P. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

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Cross-Petitioner,

vs.

JOHN CARPENTER,
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Cross-Respondents.

ON CROSS PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPPOSITION TO CROSS PETITION

COTKIN, COLLINS & FRANSCCELL

GEORGE J. FRANSCCELL
ANTHONY P. SERRITELLA

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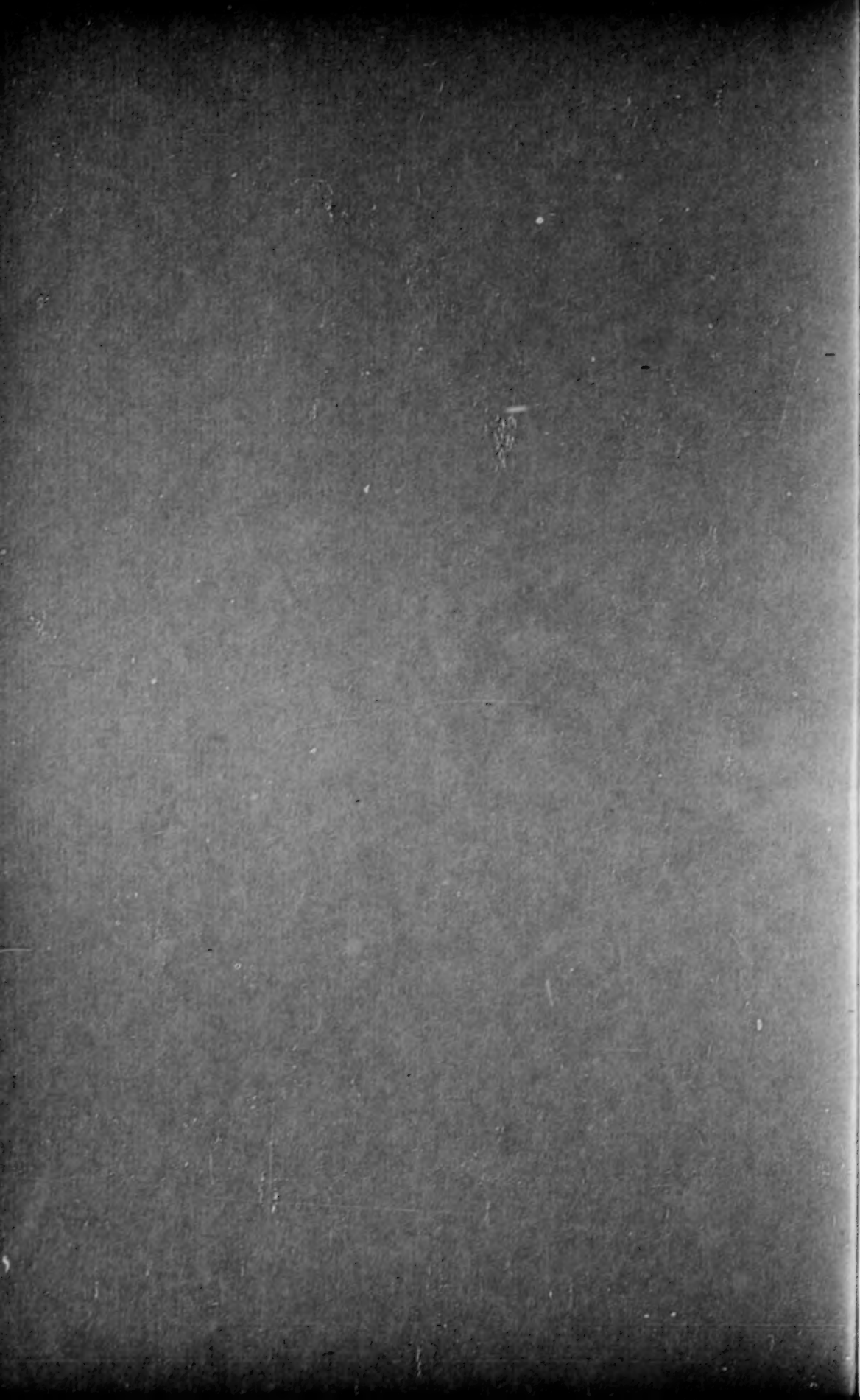
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Cross-Respondents,

OPPOSITION TO CROSS PETITION

The cross-respondents John Carpenter and the County of Santa Barbara, respectfully request that this Court deny the cross-petition for a writ of certiorari, seeking additional review of the Ninth Circuit's opinion in this case. That opinion is reported at 881 F.2d 828 (9th Cir. 1989).

REASONS FOR DENYING THE CROSS-PETITION

1. THOMAS' QUESTION IN HIS CROSS-PETITION MERELY REFLECTS A DISSATISFACTION WITH THE NINTH CIRCUIT'S REASONING AND CANNOT INCREASE THE RIGHTS GIVEN HIM BY THE COURT BELOW.

Essentially, Thomas' cross-petition covers only one aspect of the decision of the Ninth Circuit Court of Appeals. Thomas challenges what seems to be a mere comment in the Ninth Circuit's holding. The relevant comment is:

Carpenter may be able to prove at trial, or perhaps even by summary judgment, that Thomas' political loyalty in each of these positions is needed for the effective implementation of general department policy.

Thomas v. Carpenter, 881 F.2d 828, 832 (See, also, Appendix A, Cross-respondents' petition for a writ of certiorari, No. 89-933, filed December 7, 1989)

Apparently, Thomas' perceives this "holding" to condone political loyalty as a permissible consideration when determining first amendment protection. Thomas attacks the "holding" on the grounds that it overlooks a

critical distinction: that Thomas has permanent status as a civil service employee. According to Thomas, "political loyalty is the antithesis of a civil service system." (Cross-petition, page 42) Further, Thomas argues that civil service employees have a "property interest" in their employment relationship since they can only be discharged for cause.

Based upon these distinctions, Thomas argues that the *Elrod/Branti* line of cases should be eliminated as a basis of the court's consideration. These distinctions are not enough to warrant Supreme Court review of an issue more indicative of dissatisfaction than of actual conflict.

The general rule regarding the filing of cross-petitions has been stated by this Court on several occasions.

Merely attacking the reasoning of the lower court requires no cross-petition. In *U.S. v. New York Telephone Company*, 434 U.S. 159, 166 n.8 (1977), this Court held that a cross-petition was unnecessary since the respondent was free to defend a judgment on any ground that the law and the record permit, as long as such a defense would not expand the relief granted. (See, also, *Lagnes v. Green*, 282 U.S. 531, 538-539, (1931)).

Similarly, in *Mills v. Electric Auto-Lite Company*, 396 U.S. 375, 381 n.4 (1970), this Court held that when the logical result of acceptance of the respondent's additional argument would be to change more of the

judgment than is brought into issue by the initial appeal, a cross-petition must be filed.

As this Court is aware, Carpenter and the County of Santa Barbara are seeking review of the Ninth Circuit's decision. Review of the *entire* judgment (namely the reversal of the trial court's dismissal) is requested. Should review be granted by this Court, Thomas is free to raise his challenges to the Ninth Circuit's ruling.

By the terms of its questions presented, the propriety of Thomas' cross-petition is questionable. Thomas' argument involves an attack upon the reasoning of the lower court but does not involve a matter overlooked or ignored by it. As stated in *Appellate Practice in the United States*, Second Edition, Chapter 5, p. 123-124, a party,

"[N]eed not - indeed he cannot - appeal merely because of dissatisfaction with what the court has said or not said, or how it has reasoned, if there is no part of the court's order to which he objects."

In his appeal below, Thomas asked the Ninth Circuit to overturn the trial court's dismissal and allow him to proceed with his action. Through a reversal of the District Court without reservation, Thomas received the relief sought. By this remand, the complaint is given the same vitality it had prior to dismissal. Since there is no further relief or action that Thomas may receive, this cross-petition is unnecessary.

As evidenced by this Court in *Mills* the cross-petition procedure enables a non-appealing party to seek more relief than the judgment gave him. Here, there is nothing more that is available to Thomas in the event his cross-petition is successful. Because Thomas' cross-petition adds nothing to the review sought by the original petitioners, this cross-petition should be denied.

CONCLUSION

For all of the foregoing reasons, the cross-petition should be denied.

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Respectfully submitted,
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